

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DAVIS W.,

Claimant,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2011050443

DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, heard this matter in San Bernardino, California, on July 18, 2011.

Angela W., claimant's mother, represented claimant Davis W.

Jennifer Cummings, Program Manager, represented the service agency Inland Regional Center (IRC).

On July 18, 2011, the matter was submitted.

ISSUES

1. Is the Ability First program a social recreation program within the meaning of Welfare and Institutions Code section 4648.5?

2. If so, does claimant come within an exemption to the termination/suspension of social recreation services required by that section?

FACTUAL FINDINGS

1. Claimant is a six-year-old male who qualifies for agency services based on a diagnosis of mild mental retardation. Claimant also has Down Syndrome.
2. Claimant lives with his adoptive parents and siblings in Upland, California.
3. In April 2011, the service agency notified claimant's family that it was declining its request to funding the Ability First program for claimant. Claimant timely appealed and the instant hearing ensued.
4. Claimant requires assistance with activities of daily living such as brushing his teeth, bathing, grooming, and feeding. He has asthma and uses a nebulizer. He has chronic bouts of MRSA (staph infection). He is fed through a g-tube. He is visually impaired. He has sleep apnea. He is able to walk independently, but his gait is awkward. He is not toilet trained and has no bladder or bowel control. He requires constant supervision in all settings to prevent injury. He can maintain his focus on a single task for 15 to 30 minutes. He tends to wander off about once a week if not prevented from doing so. He is not verbal, but communicates through sign language and gestures.

Claimant had surgery in April 2011 to partially correct his sleep apnea, and is now administered oxygen when he sleeps. His apnea has improved substantially as a result. However, along with these improvements in claimant's sleeping patterns there has been an increase in adaptive living issues, which his parents have been unable to address as effectively as they would like.
5. An individualized education plan was instituted for claimant through the Upland Unified School District. In 2008, because claimant was medically fragile, he received educational services through home hospital, i.e., a teacher came to the see him at the family home one hour per day, five days per week. In 2009, claimant's parents formally withdrew from the IEP and discontinued his involvement with the home hospital program. Since that time, he has been home schooled.

Claimant's consumer services coordinator, Dennee Lockridge, testified that she believes claimant could be benefitted by attending one of the school district's elementary schools, which has a nursing staff available and would be a good fit for him.
6. The service agency presently funds 30 hours per month of LVN respite for claimant and his family.

7. Since May 2011, claimant has participated in the Ability First after school program, which his parents fund privately. Claimant seeks regional center funding for this program, which is one of several programs Ability First offers. The service agency does not contend that claimant does not need the Ability First after school program. Instead, the service agency's contention is that the program is social recreational in nature and is not exempt from the funding proscription set forth in Welfare and Institutions Code section 4648.5.

8. Ability First is an IRC vendor. The company is vendorized under a miscellaneous service code (028), described as "socialization training." In contrast, service code 525 is described as "social recreation program." "Socialization training" is thus distinct from social recreation.

9. According to its vendor application (dated November 2001), Ability First's socialization training program will "provide the highest quality social and recreational activities for individuals with physical and developmental disabilities." The goal statement categories include program plan implementation; diversity/sensitivity; community integration/natural environment; self-help skills/socialization; adaptive skills/socialization; independence; and behavioral component. The anticipated consumer outcomes were: increased appropriate skills; decreased inappropriate behaviors; increase capability in fine and gross motor skills; and increase knowledge and ability to use self help skills.

10. The Ability First after school program provides a culturally-sensitive environment, with age-appropriate activities that nurture social, physical, cognitive and creative abilities. Activities fall into four categories: life skills; education; adaptive recreation; and day trips. Participants are divided into groups, based on their age. A staff ratio of 5 children to 1 staff is maintained at all times. All staff possess 12 early childhood education units and are trained in CPR and First Aid. They undergo training in behavior management, program planning, use of communication devices, sensory integration activities and tools, and safety. During a child's first 30 days in the program, staff prepare nightly narratives about the child's strengths and deficits in the areas of communication, interactions with peers, fine and gross motor skills, cognitive skills, and independent living skills. Once a child has completed the first 30 days in the program, two general goals, and specific objectives within those goals, are formulated for the child. Staff then works toward achieving those objectives, and the child's progress is charted each evening. Annual progress reports are written and objectives are reviewed every six months. The main focus is teaching appropriate communication, socialization, and independent living skills.

In addition to addressing specific objectives, staff work with children concerning such matters as proper greetings, table manners, conversation skills, community safety skills, cooking, grooming, swimming, and proper etiquette in different social situations (e.g., restaurants, the library, shopping, a neighborhood park). Staff attempt to take children into the community at least weekly to practice skills learned at the center. Staff attempt to address challenging behaviors by identifying the cause of the behavior and teaching children appropriate means of meeting the underlying need, e.g., communication and coping skills to maintain self-control.

11. Ability First program supervisor Bonita Ramos testified that the after-school program consists of three teaching components: socialization skills; independent living skills; and communication skills. These skills are taught through the guise of “fun,” e.g., through games, arts and crafts, cooking, swimming, skits, and role playing. Staff also bring children out into the community, so that they can learn to generalize the skills they have learned at the center. Ability First also partners with after-school programs comprised of typical children, so that Ability First children can learn to interact with them. The program focuses on appropriate interaction in the environment.

Ramos testified that the Ability First program design is presently under revision. The revision will reflect the three program components identified above. The target date for submission is the end of 2011.

Ramos testified that Ability First has sensory integration materials that are used to help children in the areas of communication and socialization.

Ramos testified that claimant attends the program two days per week, for one to one and a half hours per day. Claimant is in a group of five to nine year olds, though two to three times per week the group participates in joint activities with a 10 to 13 year old group. All children are physically or developmentally disabled.

Ramos testified that the program believes challenging behaviors arise from an inability to communicate, or other specific causes. Staff attempt to discern the underlying reason for the behavior and address the issue at that level. As an example, if claimant takes a toy from another child instead of playing with the child, staff teach him how to communicate, “I want to play.”

Ramos testified that during claimant’s intake process at Ability First, she perceived that claimant’s family needed help. They are all devoted to him, but he “rules” the family – they never want him to be unhappy and are inclined to act so as to accommodate him in that regard. Ability First staff are working with claimant’s family to help them learn to not necessarily give in to his desires. As a result, the times when the family has to “wait him out” have become shorter.

Ramon testified that she would like to teach claimant the skills he needs so that he can become a part of the YMCA and Boys’ Club. These and similar programs have a child to staff ratio of 15:1 or 20:1; at this point in his development, claimant would “get lost” in such a program.

12. Claimant’s mother testified that she sees Ability First as a “springboard” for claimant, an opportunity for him to interact with peers, so that he can later do so on a wider societal basis. Until recently, claimant’s mother home schooled all five of her children. Then, in February 2011, two of the children started attending a school outside of the family home. In September 2011, she will begin to work outside of the home for financial reasons, and as a result all four of her children (aside from claimant) will attend a school outside the home. Accordingly, neither claimant’s mother nor his siblings will be at home during the day to

provide him with social interaction. The family will hire a nanny to take care of claimant while the rest of the family is out of the house.

Claimant's mother testified that the family has reached a point where they need support to help claimant overcome his behaviors. These behaviors include hitting himself and his siblings when he becomes frustrated; sitting down and refusing to walk, when he gets tired; constantly taking off his clothes; smearing his feces on walls; destroying things in his siblings' rooms; hiding in small spaces, such as cabinets; acting inappropriately while eating (e.g., pouring his drink on the ground and trying to lap it up like a dog).

Claimant's mother testified that she and her husband are fully committed to helping claimant (a claim that was fully supported by the evidence presented at the hearing), and eager to learn, and need help and guidance to know how to address his problem behaviors.

Claimant's mother testified that the family's ultimate goal for claimant is to help him to gradually and eventually integrate into the community, to move out of the home and into society at large. She stressed claimant's need for a peer community, i.e., others who are like him.

13. IRC program manager Marilee Gribbon testified that it is her "impression" that Ability First is a social recreation program. She stated that social recreation provides the opportunity for exposure to the community in which he resides, e.g., to go out to different activities, make purchases, go to movies and engage in similar activities.

14. The services claimant receives through the Ability First after school program does not constitute a social recreation program and are thus outside the scope of section 4648.5's suspension or termination of funding for such a program.¹ The Ability First program is certainly similar in some ways to what is traditionally considered social recreation services,² i.e., those that aim to introduce a consumer to a variety of general community environments and help the consumer to interact with other persons in the context of those environments (teaching the consumer, for example, to interact with a librarian and check out library books, or to use money appropriately to purchase items at a retail outlet). However, as described above, the Ability First program goes substantially beyond mere social recreation in terms of the behavioral and other training it seeks to provide to claimant. The use of service code 028 does not affect this result, both because that code is not used solely for social recreation programs (indeed the existence of service code 525 suggests that socialization services to be provided under code 028 constitute something *other* than social recreation) and because in addition the actual content of the program is more important than the particular code label used by the

¹ Accordingly, it is not necessary to address the applicability of the exemption to the suspension of social recreation services found in Welfare and Institutions Code section 4648.5.

² Regrettably, neither the Welfare and Institutions Code nor implementing regulations provide a clear definition of social recreation services.

service agency for administrative purposes. The evidence established that all program activities are planned to provide assistance in communication, social skills and behavioral issues.

15. The service agency argued that even if Ability First is not a social recreation program, its funding should be limited by virtue of generic resources that may be available to the family. However, the service agency did not identify any specific generic resources that the evidence established could serve claimant's needs. If the service agency finds such services in the future, it may revisit the issue at that time.

The service agency also argued that if claimant needs a program to address problem behaviors, then a behavioral modification program is more appropriate than Ability First. The service agency indicated a willingness to possibly fund such a program. However, whether or not behavioral modification would help claimant is presently unknown. What *is* known is that claimant needs Ability First. For now, therefore, the possible availability of behavior modification is speculative and cannot be the basis for denying claimant's request for Ability First funding. If in the future the service agency makes an actual determination that behavior modification is more appropriate than Ability First to meet claimant's need, it can proceed to implement such a program at that time, subject, of course, to claimant's fair hearing rights.

The service agency also argued that some of the services provided by Ability First are duplicative of those provided by the school district. This issue was not, however, raised by the service agency as a basis for the termination of funding for the Ability First program, and the issue thus cannot properly be adjudicated in this proceeding.

LEGAL CONCLUSIONS

1. In July 2009, the Lanterman Act was amended by section 4648.5 which provides that effective July 1, 2009, and notwithstanding any other provision of law or regulation to the contrary, a regional center's authority to purchase social recreation services is suspended, "except for those activities vendorized as community-based day programs." (Welf. & Inst. Code, § 4648.5, subd. (a)(2).) However:

"An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs."

2. The services claimant receives through the Ability First after-school program do not constitute social recreation services and are thus outside the scope of Welfare and Institutions Code section 4648.5. Accordingly, the service agency may not suspend or terminate funding of the Ability First program services for claimant.

3. California Code of Regulations, title 17, section 54302, subdivision (a)(64) defines “social recreation program” as “a community-based day program which provides community integration and self-advocacy training as they relate to recreation and leisure pursuits.”

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Claimant’s appeal of the service agency’s denial of funding for claimant’s Ability First program is granted.

Dated: July 28, 2011

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is a final administrative decision pursuant to Welfare and Institutions Code section 4712.5(b)(2). Both parties are bound hereby. Either party may appeal this decision to a court of competent jurisdiction within 90 days.